RECORD AND BRIEFS

No. 15-1248

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In The
Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. Appellate Courts Should Review Decisions To Enforce Or Quash Administrative Subpoenas For Abuse Of Discretion 3

A. This Court's Precedent Confirms That Review Should Be Deferential 4

B. *Amicus*'s Novel Alternative Framework Confirms That Review Should Be For Abuse Of Discretion 8

C. Whether Subpoena Enforcement Is A Legal Question Does Not Dictate The Proper Standard Of Review 9

II. The Ninth Circuit's Judgment Cannot Be Affirmed 13

A. The Court Should Decline To Entertain The Government's Alternative Ground For Affirmance 13

B. The District Court Correctly Held That The EEOC Failed To Carry Its Burden Of Establishing Relevance 15

C. The Government's Remaining Arguments For Affirmance Lack Merit 18

1. The District Court Did Not Wrongly Apply The Law 18

TABLE OF CONTENTS—Continued

Page

2. The EEOC Cannot Establish Relevance By Claiming It Needs Nationwide Contact Information For 14,000 People To Investigate "Possible" Disparate Treatment 20

3. Personal Contact Information Is Irrelevant To Investigating Any Disparate Impact Of The Neutrally Applied Evaluation 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Buford v. *United States*, 532 U.S. 59 (2001) 5

Cooter & Gell v. *Hartmarx*, 496 U.S. 384 (1990) ..... *passim*

CRST Van Expedited, Inc. v. *EEOC*, 136 S. Ct. 1642 (2016) 2, 13

Curtiss-Wright Corp. v. *Gen. Elec. Co.*, 446 U.S. 1 (1980) 11

D. G. Bland Lumber Co. v. *NLRB*, 177 F.2d 555 (5th Cir. 1949) 7

EEOC v. *Shell Oil Co.*, 466 U.S. 54 (1984) 12, 14, 16, 17

EEOC v. *United Air Lines, Inc.*, 287 F.3d 643 (7th Cir. 2002) 15

EEOC v. *United Parcel Serv., Inc.*, 587 F.3d 136 (2d Cir. 2009) 9, 10, 20

Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501 (1943) 4

FTC v. *Lonning*, 539 F.2d 202 (D.C. Cir. 1976) 8

Gen. Elec. Co. v. *Joiner*, 522 U.S. 136 (1997) 11

Gen. Tel. Co. of Sw. v. *Falcon*, 457 U.S. 147 (1982) 21

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 21

Illinois v. *Gates*, 462 U.S. 213 (1983) 2, 8

In re C.R. Bard, Inc., MDL. No. 2187, Pelvic Repair Sys. Prods. Liab. Litig., 810 F.3d 913 (4th Cir. 2016) 11

In re Deepwater Horizon, 824 F.3d 571 (5th Cir. 2016) 11

TABLE OF AUTHORITIES—Continued

Page

Koon v. *United States*, 518 U.S. 81 (1996) 10

Miller v. *Fenton*, 474 U.S. 104 (1985) 12

Okla. Press Publ'g Co. v. *Walling*, 327 U.S. 186 (1946) 4, 8

Ornelas v. *United States*, 517 U.S. 690 (1996) 1, 8

Pierce v. *Underwood*, 487 U.S. 552 (1988) ..... *passim*

Spinelli v. *United States*, 393 U.S. 410 (1969) 2, 9

Sprint/United Mgmt. Co. v. *Mendelsohn*, 552 U.S. 379 (2008) 19

Tenet HealthSystems HealthCorp. v. *Thompson*, 254 F.3d 238 (D.C. Cir. 2001) 7

Tripodi v. *Welch*, 810 F.3d 761 (10th Cir. 2016) 11

U.S. Dep't of Educ. v. *Nat'l Collegiate Athletic Ass'n*, 481 F.3d 936 (7th Cir. 2007) 7

United States ex rel. D'Agostino v. *EV3, Inc.*, 802 F.3d 188 (1st Cir. 2015) 10

United States v. Morton Salt Co., 338 U.S. 632 (1950) 4

United States v. *Real Prop. Known As 200 Acres Of Land Near FM 2686 Rio Grande City*, 773 F.3d 654 (5th Cir. 2014) 11

United States v. *Tinklenberg*, 563 U.S. 647 (2011) 2

Univ. of Pa. v. *EEOC*, 493 U.S. 182 (1990) 19

Wal-Mart Stores, Inc. v. *Dukes*, 564 U.S. 338 (2011) 21

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISION

U.S. CONST., amend. IV 1, 6, 7, 8, 9

STATUTES

Administrative Procedure Act (APA)
5 U.S.C. § 555 7
5 U.S.C. § 706 7

Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634) 14, 16

Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101 *et seq.*) 16, 17, 22, 23

National Labor Relations Act (NLRA)
29 U.S.C. § 161 4

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e *et seq.*) 16, 17

REGULATION

29 C.F.R. § 1601.12 21

OTHER AUTHORITY

110 CONG. REC. 7214 (1964) 16

REPLY BRIEF FOR PETITIONER

The parties now agree on the sole question before this Court—whether a district court's decision to enforce or quash an EEOC subpoena should be reviewed by the court of appeals *de novo* or for an abuse of discretion. Abuse of discretion is the proper standard. See *Cooter & Gell* v. *Hartmarx*, 496 U.S. 384 (1990); *Pierce* v. *Underwood*, 487 U.S. 552 (1988). Because the Ninth Circuit reviewed the district court's decision under the wrong legal standard—*de novo*—the Court should vacate the judgment and remand for consideration under the proper legal standard—abuse of discretion.

The Court-appointed *amicus* valiantly attempts to defend the Ninth Circuit's *de novo* standard on several grounds, none of which work. Primarily, *amicus* contends that the Court should borrow the Fourth Amendment standard used to review motions to suppress evidence, in which courts of appeals divide the district court's ruling into findings of fact and conclusions of law, reviewing the former for clear error and the latter *de novo*. See *Amicus* Br. at 22 (citing *Ornelas* v. *United States*, 517 U.S. 690 (1996)). Even if it were appropriate to look to Fourth Amendment jurisprudence—rather than to *Pierce*, 487 U.S. at 558-60, which controls an appellate court's selection of the appropriate standard of review—*amicus*'s analysis is unpersuasive.

The closest Fourth Amendment analogue to district-court decisions on administrative subpoena

enforcement is not, as *amicus* suggests, motions to suppress evidence (which occur *ex post*), but rather motions to grant search warrants (which, like administrative subpoenas, occur *ex ante*). This Court holds that a trial court's decision to grant a search warrant receives "great deference." *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) ("[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" (quoting *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969))). And this Court has made clear its preference for a unitary standard of review. E.g., *Cooter*, 496 U.S. at 403.

Notwithstanding its belated agreement with McLane that the Ninth Circuit applied the wrong standard, the government asks this Court to affirm nonetheless on an alternative ground. Br. of United States at 33-44. As an initial matter, this Court may "'decline to entertain[]' alternative grounds for affirmance," *United States* v. *Tinklenberg*, 563 U.S. 647, 661 (2011) (citation omitted), particularly where, as here, the issue is a "fact-sensitive" one. E.g., *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1653 (2016) (rejecting EEOC's argument for affirmance on an alternative ground because "this is not an appropriate case to reach and settle this fact-sensitive issue"). What is more, given the procedural posture of this case, this Court can only affirm, as the government correctly recognizes, if the government carries its burden of demonstrating that the record in this case admits of

only *one* conclusion. The government cannot make that showing. If anything, the government's argument for affirmance only underscores that trial courts are best positioned to evaluate the facts and—as this case exemplifies—shifting rationales for an agency's actions. The government's argument underscores the wisdom of leaving that fact-sensitive work to trial courts, as McLane and its *amici* have urged.

Accordingly, the Court should hold that the correct standard of review is abuse of discretion, reverse the Ninth Circuit's judgment, and remand for the Ninth Circuit to apply that standard in the first instance. Alternatively, if the Court decides to reach the government's alternative argument for affirmance (or even if it agrees with court-appointed *amicus* on the standard of review), it should reverse the judgment of the Ninth Circuit and render judgment reinstating the judgment of the district court, which did not err—much less abuse its discretion.

I. Appellate Courts Should Review Decisions To Enforce Or Quash Administrative Subpoenas For Abuse Of Discretion.

The government now agrees with McLane and its *amici* that appellate courts should review trial-court determinations on administrative subpoena enforcement for abuse of discretion. See Br. of United States at 15-16, 19-33. As set forth in McLane's merits brief (at 18-29), this conclusion follows from the statutory

text, this Court's precedent, and practical considerations of judicial economy—as confirmed by longstanding practice in the Courts of Appeals, all of which (save the Ninth) apply a deferential standard of review.

A. This Court's Precedent Confirms That Review Should Be Deferential.

As the government agrees (at 19), this Court's decision in *Pierce* provides the framework for determining the standard of review in this case. The analysis turns on three factors—(1) "the language and structure of the governing statute," (2) the "history of appellate practice," and (3) which judicial actor is best positioned to decide the issue in question. 487 U.S. at 558-60. As McLane demonstrated in its merits brief (at 19-25), each factor points toward the abuse-of-discretion standard here.[1]

First, as McLane explained (at 19-20), the governing statute, 29 U.S.C. § 161(1), provides district courts with the jurisdiction—but not the duty—to enforce subpoenas issued by the EEOC and NLRB. This is a strong indication that Congress intended district

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[1] Court-appointed *amicus* argues that this Court has previously reviewed decisions regarding administrative subpoenas *de novo*. See *Amicus* Br. at 29-31 (citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943); *Okla. Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 215-16 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-53 (1950)). But none of those cases confronted the Court with the question presented here—the *appropriate* standard of review. In all events, the Court did not expressly adopt a *de novo* standard in those cases, so they are of no moment in resolving the question at hand.

courts to exercise discretion in evaluating agency subpoena requests.

Second, the history of appellate practice—which is virtually uniform in applying a deferential standard in these circumstances—likewise strongly favors an abuse-of-discretion standard. See Br. of Pet. at 21-28.

And third, trial courts are best positioned to make the determination, as McLane demonstrated (at 22-25), because the enforcement of administrative subpoenas turns on "multifarious, fleeting, special, narrow facts that utterly resist generalization." See *Pierce*, 487 U.S. at 561-62 (citation omitted); see also *Buford* v. *United States*, 532 U.S. 59, 64-65 (2001) (recognizing that trial courts have a superior "understanding of the significance of case-specific details"); Br. of United States at 27-29 (noting that subpoena enforcement decisions are "highly case-specific").

Each *Pierce* factor thus points in the same direction—toward abuse of discretion as the proper standard for reviewing decisions involving the enforcement of agency subpoena requests. 487 U.S. at 558; Br. of Pet. at 19-29; Br. of United States at 19-33.

This Court's decision in *Cooter & Gell* confirms that conclusion. That case involved Rule 11 sanctions –an inquiry that, as with administrative-subpoena enforcement, could be broken up into factual, legal, and discretionary components. 496 U.S. at 399. Justice Scalia's opinion for the Court noted "the difficulty of distinguishing between legal and factual issues," and acknowledged that Rule 11 requires the

trial court to "consider issues rooted in factual determinations." *Id.* at 401.

The Court thus concluded that "*Pierce* * * * strongly supports applying a unitary abuse-of-discretion standard to all aspects of a Rule 11 proceeding." *Id.* at 403. It is the same here. Whether to enforce an EEOC subpoena is an issue "rooted in factual determinations," such as the scope of the charge, the relevance of the information, and the burden imposed by compliance. A trial court's decision applying the law to factual charges that vary from case to case—or even shift within a case—should therefore be reviewed for abuse of discretion.

Likely recognizing the futility of arguing against that conclusion, court-appointed *amicus* changes the subject, silently jettisoning the *Pierce* framework in favor of a novel, alternative approach. *Amicus* asks this Court to focus instead on "the substantive source of law" which, in *amicus*'s view, would lead to the conclusion that because *some* Fourth Amendment determinations (such as decisions on motions to suppress) receive *de novo* review, so too should decisions on administrative subpoena enforcement.

Underscoring the departure from this Court's precedent that *amicus* urges, this Court did not list the "substantive source of law" among the factors relevant to determining the standard of review in *Pierce*. It is not difficult to see why—the source of law applied by the district court is neither logically nor legally relevant to the standard of review that courts of appeals

should apply. See also *U.S. Dep't of Educ.* v. *Nat'l Collegiate Athletic Ass'n*, 481 F.3d 936, 941-42 (7th Cir. 2007) (rejecting any distinction between "judicial" and "administrative" subpoenas).

Even on its own terms, *amicus*'s argument fails because its conclusion rests on a faulty premise. Although *amicus* is certainly correct that *some* Fourth Amendment decisions—such as *ex post* review of the reasonableness of searches already performed—are subject to *de novo* review, others more closely analogous to administrative subpoena determinations are not—such as magistrate judges' decisions to grant search warrants. As demonstrated next, those Fourth Amendment decisions are reviewed with deference—just as the *Pierce* analysis dictates that decisions on administrative subpoena enforcement should be, too.[2]

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[2] *Amicus* also relies (at 31-32) on Section 6(d) of the Administrative Procedure Act, which requires courts to enforce an administrative subpoena to "the extent that it is found to be in accordance with law." 5 U.S.C. § 555(d). Setting aside whether the APA even applies here (and the sole case cited by *amicus*, *D. G. Bland Lumber Co.* v. *NLRB*, 177 F.2d 555, 558 (5th Cir. 1949), merely holds that in enacting the APA, "Congress intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena"), neither the APA nor the cases construing it indicate whether that "finding" is reviewed *de novo* or deferentially. The sole case cited by *amicus* (at 31) for the proposition that review under the APA is *de novo* concerns general review of agency actions under 5 U.S.C. § 706, not review of district court decisions enforcing or quashing subpoenas under 5 U.S.C. § 555. See *Tenet HealthSystems HealthCorp.* v. *Thompson*, 254 F.3d 238, 244 (D.C. Cir. 2001). In cases concerning subpoenas issued under the APA, the D.C. Circuit holds that "[a] finding by the district court that documents are relevant and necessary to an

B. *Amicus*'s Novel Alternative Framework Confirms That Review Should Be For Abuse Of Discretion.

Understandably abandoning the *Pierce* framework—which virtually compels the conclusion that abuse of discretion is the proper standard here—court-appointed *amicus* argues that because the reasonableness of a search under the Fourth Amendment is reviewed *de novo*, the same standard should apply to trial-court decisions regarding agency subpoena enforcement. *Amicus* Br. at 22-25 (citing *Ornelas*, 517 U.S. 690). Enforcement of administrative subpoenas, however, involves very different considerations. See *Walling*, 327 U.S. at 208-18. The trial court is not being asked to review *ex post* the propriety of a search that has already occurred. It is being asked to determine *ex ante* whether a search may occur.

The closest Fourth Amendment analogue to trial-court decisions regarding administrative subpoena enforcement is not, as *amicus* suggests, a motion to suppress evidence—it is an application for a search warrant. And this Court holds that a trial court's decision to grant a search warrant receives "great deference." *Gates*, 462 U.S. at 236 ("[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de*

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inquiry * * * is essentially factual in nature and cannot be overturned unless the district court's finding is clearly erroneous." *FTC* v. *Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976).

novo review. A magistrate judge's 'determination of probable cause should be paid great deference by reviewing courts.'" (quoting *Spinelli*, 393 U.S. at 419)). Even in the Fourth Amendment context invoked by *amicus*, then, this Court holds that the determinations most closely analogous to administrative subpoena enforcement receive deferential review.

C. Whether Subpoena Enforcement Is A Legal Question Does Not Dictate The Proper Standard Of Review.

Amicus is on stronger ground emphasizing (at 13-15, 36-41) that subpoena enforcement is a legal question. But no one disputes that a trial court must apply law in enforcing subpoenas. See Br. of Pet. at 35 (acknowledging that a district court abuses its discretion if it applies the wrong legal standard); Br. of United States at 19 (same). And no one disputes that a trial court must apply law to facts. See *Amicus* Br. at 27 (acknowledging that a district court's determination of facts should be reviewed for clear error). And as McLane has demonstrated (at 37-38 & 41 n.10), this Court has repeatedly favored a unitary "abuse of discretion" review, while recognizing that legal (or factual) error can establish an abuse of discretion. E.g., *Cooter & Gell*, 496 U.S. at 403.

Thus *amicus*'s reliance (at 40, 42-43, 44) on Judge Newman's concurring opinion in *Equal Employment Opportunity Commission* v. *United Parcel Service, Inc.*, 587 F.3d 136, 140-42 (2d Cir. 2009) (Newman, J., concurring), does not advance its cause.

First, as explained in McLane's opening brief (at 37-41), this Court has rejected the proposition that a district court's discretionary decision should be divided into legal and factual questions. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996); *Cooter & Gell*, 496 U.S. at 399.

Second, Judge Newman's concurrence emphasizes that "determining the proper relationship between * * * facts involves application of a legal standard, not a finding of fact" (*UPS*, 587 F.3d at 142 (Newman, J., concurring))—but as this Court has explained, the appropriate standard of review for fact-specific applications of law is abuse of discretion. See, e.g., *Cooter & Gell*, 496 U.S. at 402 ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts *and apply the fact-dependent legal standard* * * * *" (emphasis added)).

Third, to the extent Judge Newman's concurrence rests on the premise that district courts have no discretion in enforcing administrative subpoenas, see *UPS*, 587 F.3d at 142 (Newman, J., concurring), the conclusion that review for abuse of discretion is inappropriate does not follow. It is certainly true that *some* decisions—such as matters of trial management—are reviewed for abuse of discretion because they are committed to the district court's discretion.[3] But it is not

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[3] See, e.g., *United States ex rel. D'Agostino* v. *EV3, Inc.*, 802 F.3d 188, 195 (1st Cir. 2015) ("[Denial of a motion for leave to amend] is * * * committed to the sound discretion of the district court, and the relator is entitled to have the district court exercise

true of *all* decisions reviewed for abuse of discretion.[4] As this Court explained in *Pierce*, many decisions applying law to facts should be reviewed for abuse of discretion. 487 U.S. at 559-60. Deferential review is appropriate when "one judicial actor is better positioned than another to decide the issue in question,"

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that discretion under the proper legal standard."); *In re Deepwater Horizon*, 824 F.3d 571, 579-80 (5th Cir. 2016) (per curiam) ("A motion to disqualify [a special master] * * * is committed to the sound discretion of the district judge and is reviewed for abuse of discretion." (internal quotation marks and citation omitted)); *Tripodi* v. *Welch*, 810 F.3d 761, 764 (10th Cir. 2016) ("Because the entry of a default judgment is committed to the sound discretion of the district court, we will not overturn the court's decision without a clear showing that it manifests a clear error of judgment." (internal quotation marks, alteration, and citation omitted)).

[4] For example, trial courts are not "vested with discretion" to decide whether evidence is relevant; whether venue is proper; or whether experts' proposed testimony is reliable. Each of these decisions turns on the application of law to fact. But these decisions are reviewed for abuse of discretion—not because the district court "exercises discretion"—but because they are "multifarious and novel question[s], little susceptible * * * of useful generalization." *Pierce*, 487 U.S. at 562; see also *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997) ("[T]he question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard."); *In re C.R. Bard, Inc., MDL. No. 2187, Pelvic Repair Sys. Prods. Liab. Litig.*, 810 F.3d 913, 923 (4th Cir. 2016) ("We review the district court's applications of the hearsay rules, like applications of all Federal Rules of Evidence, for abuse of discretion[.]"); *United States* v. *Real Prop. Known As 200 Acres Of Land Near FM 2686 Rio Grande City*, 773 F.3d 654, 657 (5th Cir. 2014) ("We review all questions concerning venue for abuse of discretion."). "[B]ecause the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district courts to follow." *Pierce*, 487 U.S. at 562 (quoting *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 10-11 (1980)).

ibid. (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)); when the district court "may have insights not conveyed by the record," *id.* at 560; when an appellate court acquiring full knowledge of the factual setting may "come at unusual expense," *ibid.*; when *de novo* appellate review will "fail to produce the normal law-clarifying benefits," *id.* at 561; or when a decision is "not amenable to regulation by rule because [it] involve[s] multifarious, fleeting, special, narrow facts that utterly resist generalization," *id.* at 561-62 (citation omitted).

These factors do not establish that a matter is committed to the district court's discretion—they simply mean that a particular application of law to fact should be reviewed with deference on appeal. Thus the emphasis on whether a district court "exercises discretion" in enforcing (or quashing) an EEOC subpoena is beside the point. Whether or not Congress "vested the district court with discretion," *Amicus* Br. at 45, in deciding whether to enforce an EEOC subpoena, the district court applies law to special, narrow, fleeting facts and is far better positioned than the court of appeals to decide the issue. See Br. of Pet. at 21-25. Further, any suggestion that trial courts must *always* defer to the EEOC on the issue of relevance would conflict with this Court's decision in *Equal Employment Opportunity Commission* v. *Shell Oil Co.*, 466 U.S. 54 (1984) and the statutory scheme established by Congress to *limit* the EEOC's investigatory authority (which, unlike that of other administrative agencies, is not plenary).

Finally, *amicus* simply misunderstands McLane's point when asserting (at 57) that review for abuse of discretion would not "mean that an appellate court can dispose of the appeal more speedily." The point, as the government now agrees (at 16), is that *de novo* review would "lead to a greater number of appeals, delaying the resolution of cases." *Amicus* does not, and cannot, dispute that point.

II. The Ninth Circuit's Judgment Cannot Be Affirmed.

A. The Court Should Decline To Entertain The Government's Alternative Ground For Affirmance.

Having abandoned any defense of the Ninth Circuit's *de novo* standard of review, the government now urges this Court to affirm on the alternative ground that the record in this case admits of only one conclusion—that the personal contact information the EEOC seeks is relevant and therefore the district court necessarily abused its discretion in coming to a different conclusion. See Br. of United States at 34-44. As an initial matter, this Court should decline to entertain the government's argument and adhere to its customary practice of vacating and remanding for the courts below to apply the proper standard in the first instance—just as it did last Term when confronted by a similar argument from the government (in a case also involving the EEOC). *CRST*, 136 S. Ct. at 1653 (declining the government's request to affirm on an alternative ground after the EEOC abandoned "its defense

of the Court of Appeals' reasoning" because "[i]t is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance").[5]

Even if this Court were to accept the government's invitation to stand in the district court's shoes and make a relevance determination in the first instance—or even if the Court were to agree with court-appointed *amicus* that the Ninth Circuit applied the proper legal standard in reviewing the district court's decision *de novo*—reversal still would be required because the district court did not err, much less abuse its discretion, in performing the fact-sensitive relevance analysis required by *Shell Oil* to ensure the EEOC stays within the bounds of its investigative authority.

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[5] The government's request for affirmance is further complicated by the fact that the district court—having ordered the production of almost all of the information the EEOC requested, and having accepted McLane's argument that the remaining information sought was not relevant—did not address McLane's argument that producing the personal contact information would be an undue burden. The EEOC faults McLane (at 43-44) for not raising that argument as an alternative ground for affirmance in the Ninth Circuit, but as explained in McLane's merits brief (at 36-37), the Ninth Circuit could not have affirmed on that basis given the lack of a district-court finding. Moreover, McLane raised undue burden in its (granted) motion for the Ninth Circuit to take judicial notice of the district court's order regarding the ADEA subpoenas. See McLane C.A. Request for Judicial Notice at 1 ("[R]eview of the prior ADEA Order would be helpful to place the Order at issue in this appeal in context, including the specific finding of undue burden as to the production of termination reasons nationwide that Judge Snow made in the ADEA Order, and inherently adopted in the subsequent Order in this appeal.").

If ever there were a case where the EEOC is patently transgressing those boundaries to engage in an unauthorized fishing expedition—impermissibly "trolling for victims," as the district court put it—it is this one, where the agency is seeking the personal, confidential information of 14,000 individuals to investigate a charge alleging discrimination against one person—and where the agency's arguments why that information is relevant have constantly shifted. See *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 654 (7th Cir. 2002) (refusing to enforce EEOC subpoena seeking similarly extensive personnel information and noting that "[a]lthough the relevance requirement is not onerous, we believe that accepting the EEOC's interpretation of relevance in this case would render that requirement a 'nullity' ").

B. The District Court Correctly Held That The EEOC Failed To Carry Its Burden Of Establishing Relevance.

As McLane demonstrated in its merits brief (at 31-34), the district court carefully examined the facts and the charge and, after a hearing, determined that the EEOC failed to carry its burden of establishing relevance (and that the information sought went well beyond the scope of the charge). The district court did not err, much less abuse its discretion, in reaching that conclusion.

Unlike other agencies, the EEOC's "power to conduct an investigation can be exercised only after a specific charge has been filed in writing." *Shell Oil*, 466 U.S. at 64 (quoting 110 CONG. REC. 7214 (1964)). *Shell Oil* requires district courts to consider a subpoena in light of the specific facts and the charge, which is faithful to the EEOC's limited authority under 42 U.S.C. § 2000e. If the EEOC could subpoena anything that is theoretically useful to an investigation, there would be no limit to its investigatory authority. The agency must have a "realistic expectation"—not just an "idle hope"—that the information will shed light on the allegations in the charge. *Id.* at 63-65. Relevance is not a demanding standard—but it is not an open door, either, and it requires at least some showing of the EEOC's "realistic expectation" that it will obtain information relevant to the allegations in the charge.

Here, the EEOC seeks personal contact information, including Social Security numbers, for 14,000 individuals nationwide—on top of the voluminous material McLane has already produced. The agency's shifting rationales for why this information is relevant to its investigation—including several raised for the first time on appeal in the Ninth Circuit that were never made to the district court—underscore the lack of a legitimate justification. See McLane C.A. Br. at 24-31.

Initially, the EEOC said the information was relevant to investigate ADEA violations; then to investigate ADA violations; and finally to investigate Title VII violations—the last of which appeared nowhere in the

EEOC's district-court briefing and were raised for the first time at the hearing. See Br. of Pet. 8-11. In a footnote, the government now claims (at 37 n.10) that the EEOC "sought the pedigree information to investigate both Title VII and ADA claims." But it cites only the hearing transcript. *Ibid.* (citing JA 507-10). The EEOC's district-court briefing made clear that the pedigree information was sought for the ADA claim. See JA 467 (Heading: "EEOC Needs to Contact Test-Takers To Investigate Disability Discrimination."); JA 468 (arguing "EEOC needs to be able to contact all test-takers to determine if they are disabled under the ADA").

On appeal in the Ninth Circuit, the EEOC completely abandoned its ADA rationale for relevance and argued—for the first time—that its investigation of the charge could, "depending on the particular information uncovered," support the entire gamut of possible theories of discrimination from differential treatment to disparate impact—all on a nationwide basis. EEOC Br. 30. The EEOC thus advanced various theories that might apply if it uncovers facts somehow different from those alleged in the charge—but if that is enough to establish relevance, there is no limit to the EEOC's investigating authority, contrary to Congress's intent. See *Shell Oil*, 466 U.S. at 64.

The EEOC, under this record, cannot go on a fishing expedition "looking for victims" of any conceivable type of discrimination. The government may be right that the record in this case permits just one resolution—but if so, it is the resolution reached by the district court, not the Ninth Circuit.

C. The Government's Remaining Arguments For Affirmance Lack Merit.

While purporting to embrace the abuse-of-discretion standard of review, the government (at 38-43) commits the same error the Ninth Circuit did by treating relevance as an abstract question of law without reference to the language of the particular charge, without reference to the voluminous material already produced by McLane, and without reference to the EEOC's shifting arguments for the relevance of personal contact information for 14,000 individuals. While the district court did not expressly find that the EEOC acted with an improper motive in issuing the subpoena, any judge would—with good reason—be skeptical of a party that repeatedly shifted its rationales for seeking particular relief. Indeed, the trial court's greater familiarity with the parties' conduct of the litigation is one reason review should be for abuse of discretion.

1. The District Court Did Not Wrongly Apply The Law.

Repeating the Ninth Circuit's error, the government maintains (at 36) that the district court wrongly applied the law by equating "necessity" and "relevance," but as McLane has already explained in its merits brief (at 31-32, 34), the district court did no such thing and the government's contrary argument rests on a misreading of the district court's opinion. That is why the government has no answer for McLane's argument (at 34) "that the government should not be

able to subpoena information for which it has no need because the information will cast no additional light on the investigation." And in all events, "[a]n appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008).

The government's continued reliance (at 35-36) on this Court's inapposite decision in *University of Pennsylvania* v. *Equal Employment Opportunity Commission*, 493 U.S. 182 (1990), only underscores the weakness of the government's position. In that case, the university *conceded* that the information sought was relevant—the issue was whether "First Amendment principles of academic freedom required the recognition of a qualified privilege * * * that would require the Commission to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials." *Id.* at 188. This Court's unsurprising unwillingness to recognize such a privilege has nothing to do with whether the district court reversibly erred for making the common-sense observation that it is difficult to see how information can possibly be relevant to a government investigation if the government cannot show a need for the information.

2. The EEOC Cannot Establish Relevance By Claiming It Needs Nationwide Contact Information For 14,000 People To Investigate "Possible" Disparate Treatment.

On appeal to the Ninth Circuit, the EEOC argued for the first time that it needs the contact information because it is also investigating "possible" disparate treatment on the basis of sex. See EEOC C.A. Br. at 33-34. But the charge does not allege that Ochoa or anyone else was treated differently. Indeed, noticeably absent from the charge is what the government claims (at 39) is a "pattern of treating female applicants or employees differently from male employees with respect to the use of strength tests." Cf. *UPS*, 587 F.3d at 138, 140 (holding that district court should have enforced subpoena seeking contact information for all job applicants denied employment because of, all employees who requested an exemption due to, and all employees terminated for reasons related to company's "appearance guidelines" where charge alleged that company had "a pattern or a practice of refusing to accommodate the religious observances, practices and beliefs of its employees").

Even if the charge could be read to allege that Ochoa was subject to disparate treatment, the EEOC's blanket request for the nationwide contact information of 14,000 people is vastly overbroad. This Court's cases in the class-action context are instructive. The Court has "held that one named plaintiff's experience of discrimination was insufficient to infer that

'discriminatory treatment is typical of [the employer's employment] practices.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 356 (2011) (alteration in original) (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 158 (1982)). Even if the charge alleged disparate treatment, then, the EEOC is still not entitled to nationwide contact information for 14,000 people.

The Ninth Circuit excused the EEOC's overbroad request because the charge did not rule *out* disparate treatment nationwide. Pet. App. 13. But that is not the test—by regulation, a charge must identify the complained-of conduct. See 29 C.F.R. § 1601.12(b) ("describe generally the action or practices complained of"). Again, the Ninth Circuit's logic erases any limits on the EEOC's investigative authority. The EEOC has not shown that a district court would necessarily abuse its discretion by enforcing these limits.

3. Personal Contact Information Is Irrelevant To Investigating Any Disparate Impact Of The Neutrally Applied Evaluation.

Disparate impact involves "practices that are fair in form" but discriminatory in effect. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). Cooperating with the EEOC's investigation notwithstanding its serious concerns about its scope, McLane voluntarily produced statistical information regarding every individual who had taken the Evaluation nationwide, including:

- a unique identification number;
- the location worked;

- the person's sex;
- the reasons for taking the Evaluation;
- the position sought;
- the physical capability achieved; and
- whether the physical capability met the minimum required for the particular position.

McLane also produced validation studies of the Evaluation—and even videotapes from observations of employees actually performing the positions by the third party hired by McLane to determine the strength capabilities needed to safely perform the duties of the positions. McLane further produced information as to whether any person who had taken the Evaluation suffered an adverse employment action within 90 days thereafter (whether or not the employment action had anything to do with the Evaluation). See generally Pet. App. 28.

As noted above, the EEOC's briefing in the district court focused solely on the "need[] to contact applicants and employees to identify individuals with disabilities" for purposes of investigating whether the Evaluation "violates the ADA." JA 21. At the hearing, however, the EEOC "agreed * * * that pregnancy is not typically a disability within the meaning of the ADA, and that Ochoa does not appear to have had the sort of atypical pregnancy that would trigger the ADA." Pet. App. 25. The district court also assured itself that "Ochoa does not appear to bring the ADA charge for

another aggrieved party." *Ibid.* The district court therefore refused to enforce the subpoena to the extent it would require McLane to produce the personal contact information based on the EEOC's own admissions that it was not claiming that Ochoa was, in fact, an aggrieved person under the ADA.

On appeal in the Ninth Circuit, however, the EEOC asserted for the first time that it needs to contact people for purposes of its disparate-impact investigation to understand their experiences in taking the Evaluation and whether it is similar to the duties of their position. Before this Court, the government speculates (at 42) that individual interviews might elicit testimony that the Evaluation was not truly given for a business purpose. But the EEOC already has the information to answer that question—McLane provided videotapes and documentation of the development and application of the tests so that the EEOC could evaluate them against the backdrop of videotaped job duties. McLane C.A. Br. at 31 n.14. A nationwide mismatch between the test and the job (*i.e.*, disparate impact) would be apparent from the tapes.

Even if conducting individual interviews could somehow be relevant to the EEOC's investigation, demanding the contact information (not to mention the Social Security numbers) for more than 14,000 individuals is grossly overbroad. And, again, the agency's constantly shifting rationales for why the information is relevant to its investigation—especially given the volume of materials already produced by McLane to the agency—provided the district court with a strong clue

that what the agency really wants—and what the district court properly refused to authorize—is the plenary investigative authority to "troll for victims" that Congress has expressly denied the agency. The district court did not err, much less abuse its discretion, in reaching that conclusion.

In sum, this Court could affirm only if the record admits of only one conclusion—that a district court would necessarily abuse its discretion by refusing to enforce the EEOC's subpoena. The EEOC has not carried this burden, and even if this Court concludes that the district court erred, the case should be remanded for the district court to exercise its discretion in the first instance.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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